INNKEEPERS—GUESTS—WHO ARE GUESTS.—The plaintiff, upon alighting from a train, handed his baggage to the defendants' hotel porter, who took it to the hotel. The plaintiff did not then intend to engage lodging or refreshment at the hotel but merely to make his headquarters there free of charge during a few hours stay in the city. The plaintiff's baggage was lost, and he sued the defendants therefor. *Held*, the plaintiff was not a guest, and defendants are liable only as gratuitous bailees. *Parker* v. *Dixon* (Minn.), 157 N. W. 583.

It is difficult to frame a definition of a guest which will meet all cases. But it seems to be settled that if a person goes to an inn as a traveler, wayfarer or transient to receive its customary lodging and entertainment, and the keeper of the inn received him as such, he becomes a guest. *Fay* v. *Pacific Imp. Co.*, 93 Cal. 253, 26 Pac. 1099; *Norcross* v. *Norcross*, 53 Me. 163; *Bershire Wollen Co.* v. *Proctor*, 7 Cush. (Mass.) 417. And neither the length of time he remains at the inn, nor any agreement he may make as to the price of board per day or week, deprives him of his character as a traveler and guest, if he retains this *status* in other respects. *Jalie* v. *Cardinal*, 35 Wis. 118; *Hall* v. *Pike*, 100 Mass. 495; *Shoecraft* v. *Bailey*, 25 Iowa 553. It has been held in some cases that, although a traveler does not go, or intend to be personally entertained at an inn, yet if he sends his horse there to be cared for, he will be considered constructively a guest. *Mason* v. *Thompson*, 9 Pick. (Mass.) 280. See *Russell* v. *Fagan*, 7 Houst. (Del.) 389, 8 Atl. 258. But the better rule, on reason and principle, would seem to be that where one is not personally entertained at an inn, and did not intend to be so entertained, he does not become a guest by merely sending his horse or goods to the inn to be cared for. *Tulane Hotel Co.* v. *Holohan*, 112 Tenn. 214, 79 S. W. 113; *Healey* v. *Gray*, 68 Me. 489; *Ingallsbee* v. *Wood*, 33 N. Y. 577.

When one ceases to be a traveler, transient, or wayfaring man, and takes up a permanent abode at an inn, he is no longer a guest in a legal sense. *Crapo* v. *Rockwell*, 48 Misc. 1, 94 N. Y. Supp. 1122; *Vance* v. *Throckmorton*, 68 Ky. 41. Nor is one a guest who boards at an inn paying monthly a price fixed by contract. *Lawrence* v. *Howard*, 1 Utah 142; *Manning* v. *Wells*, 9 Humph. (Tenn.) 746. Nor, under the same circumstances, if he pays by the week. *Johnson* v. *Reynolds*, 3 Kans. 251; *Meacham* v. *Galloway*, 102 Tenn. 415, 52 S. W. 859. There is no inconsistency, however, in the fact that both guests and those who reside permanently at an inn can be entertained there at the same time. *Lusk* v. *Belote*, 22 Minn. 468. And as to those residing at the inn permanently, the inn would be legally a boarding house, while as to those who patronize the inn as travelers, the relation of innkeeper and guest would exist. *Lusk* v. *Belote*, *supra*.

SALES—REFUSAL TO ACCEPT GOODS SPECIALLY MANUFACTURED—MEASURE OF DAMAGES.—The plaintiff agreed to make certain machinery for the defendant's special use, but reserved title in himself until full payment had been made. The machinery had no general market value, and the buyer having refused to accept it, the seller stored the goods for the

buyer's benefit and sued him for the contract price. *Held*, the plaintiff can recover the contract price, notwithstanding the analogy of this remedy to the equitable remedy of specific performance. *Fisher Hydraulic Stone and Machinery Co.* v. *Warner* (C. C. A.), 233 Fed. 527.

The American courts have fallen into confusion as to the measure of damages for the breach of an executory contract for the sale of goods, where the breach occurs before the title has passed. The English rule is that the only damage to be recovered in such cases is the difference between the contract price and the market price of the goods. *Barrow* v. *Arnaud*, 8 Q. B. 604. See *Elliott* v. *Pybus*, 10 Bing. 512. This rule is firmly established in England as to all personalty, and has been followed in many American states. *Moody* v. *Brown*, 34 Me. 107, 56 Am. Dec. 640; *McCormick, etc., Co.* v. *Balfany*, 78 Minn. 370, 81 N. W. 10, 79 Am. St. Rep. 393; *American Hide & Leather Co.* v. *Chalkley*, 101 Va. 458, 44 S. E. 705.

While the English rule is generally followed in this country where the goods are not made to order and have a general market value, the American courts are divided on the question as to the measure of damages for the breach of a contract for the sale of goods made to the order of the vendee. Many cases allow a recovery, basing their reasoning on the unsound ground that such contracts are for work and labor only, and that the passing of title does not constitute the consideration. *Ballentine* v. *Robinson*, 46 Pa. St. 177. This view seems to have influenced the court in the important decision which inaugurated the New York doctrine which now apparently goes the whole length of allowing the seller to recover the contract price in every case where the buyer is in default. *Bement* v. *Smith*, 15 Wend. (N. Y.) 493. See *Dustan* v. *McAndrews*, 44 N. Y. 72, 78; *Ackerman* v. *Rubens*, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728. This rule is supported on the ground that damages are often an inadequate remedy, a resale involves extra expense and the vendee should not be allowed to put the vendor in a worse position by breaking than by performing the contract. *Shawhan* v. *Van Nest*, 25 Ohio St. 490, 18 Am. Rep. 313. This doctrine is established in some states by statute. *Dowagiac Mfg. Co.* v. *Higinbothem*, 15 S. D. 547, 91 N. W. 330.

The more moderate doctrine of the instant case forces title on the defaulting vendee only when the goods have been manufactured to his special order and have not a ready market value. This is the rule of the best considered cases. *Kinkead* v. *Lynch*, 132 Fed. 692; *Smith* v. *Wheeler*, 7 Ore. 49, 33 Am. Rep. 698. See *Black River Lumber Co.* v. *Warner*, 93 Mo. 374, 6 S. W. 210; *Gordon* v. *Norris*, 49 N. H. 376, 383. Such a rule is eminently just and affords an important safeguard to many commercial transactions. It is true that such a remedy is equivalent to specific performance of the contract at law; but does not the law also exact specific performance and decree the passage of title against the will of the defendant where goods are replevined from a party guilty of fraud or duress, where the vendee in most conditional sales defaults in the payment of instalments and where a plaintiff waives a tort and sues in assumpsit? The principal case seems to be the first

to give a remedy which it recognizes as analogus to specific performance. This question is discussed in an interesting monograph by Prof. Williston, 20 HARV. LAW REV. 363.

TORTS—PROXIMATE CAUSE—INTERVENING WRONGFUL ACTS.—The defendants stored explosives in a public highway, in violation of the law. Boys who were accustomed to play near the place carried away some of the explosives, and next day the plaintiff's intestate was killed by their explosion. Plaintiff brought an action for damages for his wrongful death. *Held*, the plaintiff can not recover. *Perry* v. *Rochester Lime Co.* (N. Y.), 113 N. E. 529. See NOTES, p. 137.

TRUSTS—MISAPPROPRIATION OF FUNDS—LIABILITY OF BANK.—An executor kept his individual account in the defendant bank, and the funds of the estate in another bank. At different times he drew checks as executor payable to himself as an individual which he deposited to his individual account, until his entire account was composed of trust funds. He then drew a check on the defendant bank to pay a debt which he owed it. A shortage being found in the executor's accounts, the defendant was sued for all trust funds deposited with it. *Held*, the bank is liable for the amount of the debt paid to it and all funds deposited with it after such payment. *Bischoff* v. *Yorkville Bank* (N. Y.). 112 N. E. 759.

There are three ways in which a bank may incur liability for the misappropriation by a fiduciary of money deposited with it: by breach of a contract, express or implied, between itself and the owner of the fund; by appropriating the fund to the payment of a debt owed it by the fiduciary; and by knowingly assisting the fiduciary to perpetrate a fraud. These three grounds of liability are distinct; but in a given case the bank's liability may be placed on any one or more of them.

That the bank can be held liable for the breach of its contract is clear, and gives little trouble. *Am. Nat. Bank* v. *Fidelity, etc., Co.*, 129 Ga 126, 58 S. E. 867, 12 Ann. Cas. 666. Thus, a bank was held liable for the amount of a check drawn to the order of its cashier to be deposited to the account of a trustee but which the bank deposited to his individual account. *Duckett* v. *National Mechanics Bank*, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513.

In order to be held liable to the true owner for misappropriated funds which were used to pay a debt owed it, a bank must, by the weight of authority, know, or have reasonable cause to believe, that the funds were of a fiduciary character. *Wood* v. *Boylston Nat. Bank*, 129 Mass. 358, 37 Am. Rep. 366. But in such cases very slight circumstances are sufficient to put the bank on notice, and when a check which is signed by a person in the capacity of a trustee is presented in payment of the bank's own claim, it is thereby put on notice and must ascertain at its peril the validity of the transaction. *Ward* v. *City Trust Co.*, 192 N. Y. 61, 84 N. E. 585. And even where the bank has no notice, it seems that the true owner may recover the funds if the bank has not changed its position in reliance upon the apparent ownership of the funds, notwith-